

**In the Matter of: Objection to Issuance of Sanitary Sewer Construction Permit No. 18375R,
Proposed Foxmoor Unit 2 and Phase 1 Subdivision, Merrillville, Lake County, Indiana.
2007 OEA 64 (07-W-J-3852)**

TOPICS:

Motion to Dismiss	different courts
notice	law of the case
service territory dispute	permit revocation
appeal	IC 4-21.5-3-5(b)
sanitary sewer	IC 4-21.5-3-21
financial interest	315 IAC 1-3-18
collect tax	327 IAC 3-2-2
de novo review	Trial Rule 12(b)(6)
water pollution/control facility	Trial Rule 12(b)(8)
intervener	Appellate Rule 39(A)
substantial evidence	<i>Huffman</i>
same action	

PRESIDING JUDGE:

Daidsen

PARTY REPRESENTATIVES:

Petitioner:	Catheron A. Paras, Esq. Independence Hill Conservancy District
Respondent/Permittee:	Kenneth D. Reed, Esq. GCC Merrillville Venture, LLC
Intervener:	William L. Touchette, Esq. Merrillville Conservancy District
IDEM:	April D. Lashbrook, Esq.

ORDER ISSUED:

April 17, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

RELATED CASE ACTIVITY:

Lake County Circuit Court	Cause No. 45C01-6204-CV-00509
Indiana Court of Appeals	Cause No. 45A03-0610-CV-00467

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AND THE COURT, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. The Indiana Department of Environmental Management (the “IDEM”) issued Construction Permit Approval No. 18375R (the “Permit”) to GCC Merrillville Venture, LLC (“GCC”) on December 20, 2006. The Permit allowed GCC Lakes to construct a water pollution/control facility. The Petition for Administrative Review and Stay of IDEM Construction Permit (the “Petition”) of this construction permit was filed on January 5, 2007, and was assigned Office of Environmental Adjudication (“OEA”) Cause Number 07-W-J-3852.
2. The Petition was timely filed, per Ind. Code § 4-21.5-3, *et seq.*
3. Petitioner based its Petition upon the following contentions:
 - a. IDEM did not provide notice of GCC’s permit application as required in IC 4-21.5-3-5(b) and 327 IAC 3-2-2(6);
 - b. the real estate upon which the Permitted project is to be constructed by GCC is owned by GCC, and is subject to service territory dispute between IHCD and Merrillville Conservancy District (“MCD”). IHCD has a financial interest in collecting taxes and has valid property rights within this territory;¹
 - c. IHCD’s appeal has been perfected and remains pending from the Lake County Circuit Court’s² September 7, 2006 decision granting annexation of this territory to MCD; therefore, the territorial dispute has not been resolved.
4. The Lake County Circuit Court’s September 6, 2007 Order has not been stayed, and remains in effect, until a contrary decision is issued through the appellate process.
5. On April 17, 2007, the OEA granted MCD’s March 15, 2007 Petition to Intervene, finding that MCD was aggrieved or adversely affected, as required by IC§ 4-21.5-3-21, as follows:
 - GCC owns the real estate and seeks to construct a sanitary sewer on the real estate;
 - The sewer facility in dispute in this cause is alleged to be located in MCD’s territory;
 - MCD will be bound by all lawful stipulations, rulings, and other matters of record made prior to its intervention;

¹ IHCD’s territorial service rights were based upon a July 3, 1990 Annexation Order issued by the Lake County Circuit Court and on a July 26, 1990 service right transfer from Lincoln Utilities, Inc. (“Lincoln”). IHCD’s real estate ownership were based upon a January 4, 1991 “Bill of Sale” from Lincoln. Proof of these territorial service rights were offered into evidence in Lake County Circuit Court cause number 45C01-6204-CV-00509.

² Lake County Circuit Court cause number 45C01-6204-CV-00509; cause number on appeal is 45A03-0610-CV-00467.

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- MCD's financial interest in special benefits taxes, to be collected once GCC's property is improved with the sewer and other development;
 - When constructing MCD's West Side Interceptor Sewer Project, MCD expended additional funds to allow the Interceptor to serve GCC's real estate at controversy in this cause;
 - Construction costs for MCD's West Side Interceptor Sewer Project may be recouped if the permit at issue is approved;
 - MCD's interest in these proceedings are not adequately protected by any other party to this cause.
6. Respondent/Permittee GCC based its Motion to Dismiss per Ind. Tr. R. 12(b)(8) upon the existence of "substantially the same issues" currently pending before the Indiana Court of Appeals. IDEM is not a party to the Lake County case. The Lake County case addressed the issue of service territorial rights. IHCD's Petition before the OEA is based upon its assertion that it possesses service territorial rights and real estate ownership.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the agency actions of the Indiana Department of Environmental Management and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, *et seq.*, and 315 IAC 1, *et seq.*
2. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. Indiana Dept. of Natural Resources v. United Refuse Co., Inc., 615 N.E.2d 100 (Ind. 1993), Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "*De novo* review" means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

4. This was held to be directly applicable to the Office of Environmental Adjudication in Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management, 820 N.E.2d 771, 781 (Ind.App. 2005). In this case, the ELJ specifically concluded that she must give deference to the agency's interpretation. The Appellate Court reversed OEA's decision because the ELJ used the wrong standard of review. The Court stated that the ELJ mistakenly applied the appellate standard of review rather than a *de novo* standard of review. *Id.* The OEA must apply a *de novo* standard of review when making findings of fact and conclusions of law and may not defer to IDEM's findings or conclusions.

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5. OEA is required to base its factual findings on substantial evidence. Huffman v. Office of Env'tl. Adjud., 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, IC§ 4-21.5-3-27(d). OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." IC § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." Matter of Moore, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. Burke v. City of Anderson, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). GasAmerica #47, 2004 OEA at 129. *See also*, Blue River Valley, 2005 OEA at 11, 12. Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338), 2005 OEA 26, 41.
6. While IC § 4-21.5-3-24 addresses procedures, such as filing deadlines, for Motions to Dismiss, substantive provisions of Indiana's Rules of Trial Procedures have been applied to motions to dismiss adjudicated before the OEA. 315 IAC 1-3-18.
7. In this Cause, Respondent/Permittee GCC, and Intervenor, MCD, sought dismissal of the Petition, based on Ind. Tr. R. 12(b)(8), that the same matter is pending in another state court of this state. Petitioner provided a copy of the Lake County Circuit Court's September 7, 2006 decision, in Petitioner's February 14, 2007 Consolidated Objection. "The determination of whether two actions are being tried in different state courts constitute the same action depends on whether the outcome of one action will affect the adjudication of the other." Crawfordsville Apartment Company v. Key Trust Co. of Florida, 692 N.E.2d 478 (Ind.Ct.App. 1998). The issues in controversy in this cause before the OEA depend upon the outcome of the issues being adjudicated in the pending appeal of the Lake County case.
8. A review of the Lake Circuit Court's decision demonstrates that it extinguished IHCD's territory service and real estate rights. Cunningham v. Miles, 402 N.E.2d 17 (Ind.Ct.App.1980). Since the Lake County Circuit Court's September 7, 2006 decision was not stayed, Ind. App. R. 39(A), it remains the law of the case, and must be given effect by the OEA. If OEA were to grant IHCD's request for relief in the form of a stay, OEA would impermissibly grant a stay of the Lake County Circuit Court's September 7, 2006 Order, which OEA refuses to do.
9. Respondent and Intervenor further seek dismissal based upon Ind. Tr. R. 12(b)(6), failure to state a claim upon which relief can be granted. In reviewing a Rule 12(B)(6) motion, a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint. This Court views the pleadings in a light most favorable to the nonmoving party, and we draw every reasonable inference in favor of that party." Huffman v. Indiana Office of Environmental Adjudication, et al., 811 N.E.2d 806, 814 (Ind. 2004).

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10. Petitioner seeks the relief of permit revocation, for failure to receive notice as required in IC § 4-21.5-3-5(b) and 327 IAC 3-2-2(b). IC § 4-21.5-3-5-(b) requires an agency to give written notice of an order to each person who has a substantial and direct propriety interest in the subject of the order. Assuming, *arguendo*, that Petitioner interpreted IC § 4-21.5-3-5(b) to require IDEM to give it notice, the requisite notice would pertain to the permit as issued, and not to the application. Petitioner timely filed its Petition, demonstrating timely receipt, despite the source, such that Petitioner was not prejudiced in the form of being denied appeal before OEA. Petitioner failed to identify authority which would authorize OEA to revoke this Permit for lack of notice from IDEM, even if assumed. And, Petitioner's substantial and direct proprietary interest in the subject matter had been denied by the Lake County Circuit Court prior to IDEM's issuance of the Permit.
11. Petitioner further seeks the relief of permit revocation, for failure to receive notice as required in 327 IAC 3-2-2. Petitioner cited 327 IAC 3-2-2 as requiring (6) All applications for construction permits must include a signed and dated form as provided by the commissioner for the identification of affected persons as determined by IC 4-21.5-3-5(b). Petitioner stated that lack of notice of the application prejudiced its ability to comment. Petitioner's allegation of prejudice from lack of comment does not provide sufficient proof of harm, speculates that IDEM's permit issuance would have produced a different outcome favorable to Petitioner, and lacks authority for OEA to revoke this Permit.
12. In viewing the pleadings in a light most favorable to Petitioner, Petitioner is not entitled to recover under any set of facts admissible under the allegations of the complaint. Respondent and Intervener have presented substantial evidence that this matter should be dismissed pursuant to Ind. Tr. R. 12(b)(6) and 12(b)(8).

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Respondent/Permittee, GCC Merrillville Venture, LLC and Intervener Merrillville Conservancy District's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that further proceedings before this Court are hereby VACATED.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 17th day of April, 2007 in Indianapolis, IN.

Hon. Mary L. Davidsen, Chief Environmental Law Judge